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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL B. GRAVES,	**ECF CASE**
Plaintiff,	07 Civ. 5471 (BSJ) (KNF)
- against -	
DEUTSCHE BANK SECURITIES INC.,	
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS CLAWED-BACK BY PLAINTIFF PURSUANT TO RULE 26(b)(5)(B)

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INTRODUCTION

In this age discrimination and retaliation claim, Defendant Deutsche Bank Securities Inc. ("DBSI") seeks to compel plaintiff, Daniel Graves, to produce handwritten notes which he disclosed in discovery but subsequently "clawed back" under a purported claim of attorney-client privilege pursuant to Fed. R. Civ. P. 26(b)(5)(B). The notes in question, authored by Mr. Graves around the time of his termination in 2004, report on various oral communications around his termination (the "Notes").[1] Critically, the Notes contradict his central allegation that he was told his employment was being terminated because his clients were "needed for younger bankers." As explained below, despite shifting explanations about the circumstances surrounding the Notes, Mr. Graves's deposition testimony reveals that the Notes are not an attorney-client communication. On the contrary, although the Notes arguably might constitute materials "prepared in anticipation of litigation" pursuant to Fed. R. Civ. P. 26(b)(3)(A), the Notes should be produced for three reasons: (1) Mr. Graves has never claimed the protections of Fed. R. Civ. P. 26(b)(3)(A) despite ample opportunity to do so, and thus, has waived the limited immunity set forth in the Rule; (2) Mr. Graves waived any claim of immunity or privilege when he reviewed the Notes in preparation for his deposition; and (3) even if Mr. Graves had not waived the limited immunity in Fed. R. Civ. P. 26(b)(3)(A), the Notes merely recite factual events, do not contain any attorney's mental impressions, and DBSI can show, pursuant to the Rule, that "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Accordingly, the Court should overrule Mr. Graves's claim of privilege and allow DBSI to use the Notes in this litigation.

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[1] The Notes, attached to the Affirmation of Joanne Seltzer, Esq. ("Seltzer Aff.") and submitted herewith as Exhibit A, are being filed in redacted form via ECF and submitted to Chambers without redaction.

BACKGROUND OF THE DISPUTE

Mr. Graves alleges that on January 14, 2004, his supervisor, Jeffrey Amling, told him that he was being fired because "his clients were 'needed for the younger bankers.'" (Sec. Am. Compl. ¶ 11.)[2] The phrase "needed for younger bankers" is in quotation marks in the Complaint. (Id.) Mr. Amling denies making the statement. As described below, the Notes bear on this as well as other key credibility issues.

The Notes consist of four discrete pages. The first page details seven conversations that took place on January 14, 2004. (See Seltzer Aff. Exh. A at Graves 065018.) The key conversation, for purposes of this motion, is the first conversation, a talk with Jeff Amling at 11:00 a.m. The notations for this conversation contain three bullet points, (1) **REDACTED**, (2) **REDACTED** (3) **REDACTED**. (Id.)[3] Each of these points is quoted, almost verbatim, in the complaint. (See Seltzer Aff. Exh. E at ¶¶ 11, 75.) Significantly, however, the Notes do not contain the phrase "needed for younger bankers," as quoted in the Complaint, nor anything else that suggests that anything like that statement was made by Mr. Amling in the termination meeting. (See Seltzer Aff. Exh. A at Graves 065018.) As with all the seven conversations on the first page, and indeed, all the notations on each of the pages, the statements in the Notes seem to be direct quotes or paraphrases from the conversations rather than commentary about the conversations. In other words, they are records of the conversations rather than Mr. Graves's impressions of those conversations. Any juror would surely consider the Notes highly useful in evaluating the veracity of Mr. Graves's allegations with respect to the January 14 conversation.

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[2] Copies of the relevant paragraphs of the Second Amended Complaint, filed on August 4, 2008, are attached to the Seltzer Aff. as Exhibit E.

[3] **REDACTED**

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The second page of the Notes describes **REDACTED**. (See Seltzer Aff. Exh. A at Graves 065019.) As with the first page, this page of notes appears to be an attempt to directly quote or paraphrase Mr. Amling's statements. According to the Notes, Mr. Amling says **REDACTED**. The Notes go on to state, **REDACTED**. (Id.) Thus, the phrase **REDACTED** was, according to the Notes, articulated on January 20 and not January 14. Even more importantly, the Notes indicate that **REDACTED**. Rather, the Notes suggest that **REDACTED**. In other words, Mr. Amling was telling Mr. Graves to **REDACTED**. From the context, it appears that this statement was **REDACTED**. On its face, the note regarding the January 20 conversation does not purport to say why Mr. Graves was terminated.

In addition to the conversation with Mr. Amling, the Complaint recounts a second conversation, purportedly on January 20, that took place between Mr. Graves and Mr. Amling's supervisors – Jim DeNaut and Jacques Brand. (See Seltzer Aff. Exh. E at ¶ 77.) According to the Complaint, what is so critical about this conversation is that Mr. Graves supposedly told Messrs. DeNaut and Brand about Mr. Amling's purported January 14 statement that he was terminated because DBSI "needed his accounts for younger bankers." The conversation with Messrs. DeNaut and Brand is key because this conversation is supposedly Mr. Graves's protected activity that forms the necessary lynchpin for his retaliation claim. (See Seltzer Aff. Exh. E at ¶¶ 88, 91.) Despite the critical nature of these comments, and despite the fact that the Notes purport to describe mid- to late January conversations bearing in some way upon his termination, there are no notes of this conversation. (See Seltzer Aff. Exh. A.) Any juror would surely consider the lack of any notations reflecting this key meeting in evaluating the veracity of Mr. Graves's claims.

Mr. Graves produced the Notes to DBSI in this action on November 24, 2010. On December 20, 2010, Mr. Graves's counsel wrote a letter to DBSI's counsel, claiming that the Notes were inadvertently produced. Mr. Graves's counsel asserted that "These were documents that Mr. Graves prepared after the events described, at the request of the attorney or attorneys he was seeking to retain or had retained." (Letter from Richard T. Seymour, Esq., dated Dec. 20, 2010, attached to the Seltzer Aff. as Exh. B.) Notably, the privilege log, however, provides a different gloss, describing the Notes as "Notes on his termination, prepared for the benefit of the counsel he expected to retain." (Pl.'s Privilege Log dated August 21, 2009 at p. 3, attached to the Seltzer Aff. as Exh. C.) After DBSI requested that Mr. Graves provide additional information about the Notes so as to evaluate Mr. Graves's claim of privilege, Mr. Graves's counsel wrote to DBSI's counsel on January 5, 2011. In the January 5 letter, counsel characterized the Notes as being "prepared for the purpose of communication with prospective and future counsel stated in the Privilege Log, for use by prospective and future counsel identified in the Privilege Log . . ." (Letter from Richard T. Seymour, Esq., dated Jan. 5, 2011, at pp. 1, 6, attached to the Seltzer Aff. as Exh. D.) Thus, Mr. Graves's counsel has variously described the Notes as being prepared "for the benefit of" counsel, "at the request of" counsel and "for the purpose of communication with" counsel.

In his deposition, when asked why he created the Notes, Mr. Graves said he was "preparing to attempt to get retained by counsel, and I prepared the notes in anticipation of - of - that." (Graves Dep. at 237:22-25.)[4] He further testified:

Q. Why did you create the notes?

[4] Copies of the pages of the transcript of the deposition of Daniel Graves, dated January 10, 2011, are attached as Exhibit F to the Seltzer Aff.

A. To prepare for a meeting with Mr. Seiler and Ed Friedman, his partner. The name of the firm was Friedman Kaplan & Seiler.

Q. Did they ask you to make the notes?

A. They asked me to be prepared for the meeting.

Q. Did they ask you to create the notes?

A. I created the notes in preparation for the meeting, to brief them.

(See Seltzer Aff. Exh. F at 239:4-13.) Additionally, Graves was unable to recall whether he ever gave the Notes to the prospective attorneys he met with. (See Seltzer Aff. Exh. F at 241:7-10, 241:25-242:7, 244:23-25, 245:11-14 (answering "I don't know" or similar answers to five different questions aimed at eliciting whether Mr. Graves gave the Notes to the prospective attorneys).) Indeed, the fact that he retained the handwritten notes in his possession and did not convert them to electronic format until 2007 strongly suggests that he did not provide the Notes to those attorneys at the time.[5]

Critically, Mr. Graves testified that he reviewed the Notes in preparation for his deposition, and further, he could not deny that the Notes refreshed his recollection of the events:

Q. Did you review any handwritten notes that you maintained?

A. I believe I did.

Q. What handwritten notes did you review?

A. I have some handwritten notes of some – some voicemails and some conversations that I had with Mr. Amling in January of 2004.

Q. And when did you review – when did you last review those notes?

A. I don't remember when I last looked at them.

Q. And you reviewed them in preparation for your deposition?

A. Yes.

Q. And did they help you recall events?

A. I – I – I don't know that they did or they didn't.

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[5] The metadata in the electronic version of the Notes produced by Plaintiff indicates a creation date of July 29, 2007, the date the paper document was converted to electronic format.

(See Seltzer Aff. Exh. F at 224:11-225:4.) Obviously, having needed the Notes to prepare for a meeting with prospective counsel within weeks of the transcribed events, the Notes – which Mr. Graves admitted he had reviewed in preparation for his deposition – must have refreshed Mr. Graves's recollection before his deposition nearly seven years later. Indeed, while Mr. Graves says he does not know if his review of the Notes helped him recall events for his deposition, at the deposition he quoted from the Notes almost verbatim (except, of course, for his addition of the key age remark that is not reflected in the Notes):

> Q. You said you remember three things he told you?
>
> A. **REDACTED**
>
> And those are the three things that I remember from that meeting.

(See Seltzer Aff. Exh. F at 246:12-21.)

ARGUMENT

I. THE NOTES ARE NOT SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE.

In his Privilege Log and in correspondence from his counsel, Mr. Graves has taken the position that the Notes are protected by the attorney-client privilege. As explained below, that position is untenable. Mr. Graves, by virtue of his own deposition testimony, cannot prove a critical element of his privilege claim, namely, that the Notes constitute a communication to an attorney.

Federal and state courts in New York have observed that the "enforcement of a claim of privilege acts in derogation of the overriding goals of liberal discovery and adjudication of cases on their merits. It is for this reason that privileges are disfavored and generally to be narrowly construed." Bowne of NYC, Inc. v. AmBase Corp., 150 F.R.D. 465, 473 (S.D.N.Y. 1993) (collecting cases). The burden of establishing the applicability of any privilege rests with the party asserting the privilege. See von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir.

1987). Notably, a litigant may not cloak non-privileged documents with privilege simply by giving them to his attorney. See Fisher v. U.S., 425 U.S. 391, 403-04 (1976) (noting that non-privileged documents do not become privileged by virtue of sharing them with attorney).

In his deposition, Mr. Graves could not recall ever giving the Notes to the prospective attorneys he was meeting with. (See Seltzer Aff. Exh. F at 241:25-242:7.) On the contrary, the fact that Mr. Graves kept the Notes and later produced them in this litigation is evidence that he did not give the handwritten Notes to the prospective attorneys, at that time. Moreover, Mr. Graves refused to testify that the Notes were created at the request of the prospective attorneys (See Seltzer Aff. Exh. F at 239:4-13.) Courts confronted with similar fact patterns have concluded that unless a party's notes constitute a communication to an attorney or were taken at the behest of an attorney, they are not privileged. See Larson v. Harrington, 11 F. Supp. 2d 1198, 1203 (E.D. Cal. 1998) (holding that notes created after attorney requested they be created were privileged, whereas notes that client created on his own were not privileged "because although they came into counsel's possession they were not made as communications from client to attorney"); cf. Thomas v. Euro RSCG Life, 264 F.R.D. 120, 122 (S.D.N.Y. 2010) (holding that notes of conversation were privileged where "plaintiff communicated this information in confidence to her attorney for the purpose of seeking legal advice").

Examining the content of the Notes further reveals that they are purely factual in nature and do not contain any commentary directed at his attorneys. Indeed, it is clear from reviewing the Notes and Mr. Graves's deposition testimony that he prepared the Notes for his own future use in assisting his recollection of the events surrounding his termination. (See Seltzer Aff. Exh. A, F at 237:22-245:14.) And, in fact, he used them for that very purpose in preparation for his deposition. As such, the Notes might constitute materials prepared in anticipation of litigation, but they are not protected by the attorney-client privilege.

In sum, because the Notes were not prepared at the request of counsel and were not a communication to counsel, no claim of attorney-client privilege will lie and the Notes should be produced.

II. PLAINTIFF WAIVED THE LIMITED IMMUNITY OF RULE 26(b)(3)(A) BY FAILING TO ASSERT SUCH IMMUNITY.

As noted above, Mr. Graves has only asserted that the Notes are protected by the attorney-client privilege; he has not claimed that the Notes are immune from discovery as materials "prepared in anticipation of litigation" pursuant to Fed. R. Civ. P. 26(b)(3)(A), an argument that would fit more closely with Mr. Graves's deposition testimony that he created the Notes to prepare for a meeting with prospective attorneys about a potential legal claim. However, in his Privilege Log, Mr. Graves only claimed the attorney-client privilege. (See Seltzer Aff. Exh. C.) Furthermore, once this dispute arose, his counsel wrote to DBSI on two occasions concerning only the Notes, and still Plaintiff did not assert any immunity from disclosure under Fed. R. Civ. P. 26(b)(3)(A). (See Seltzer Aff. Exh. B, D.) Because Mr. Graves had ample opportunity to raise the issue and has not done so, he has waived any argument for protection under Fed. R. Civ. P. 26(b)(3)(A). See Ayers v. SGS Control Servs., No. 03 Civ. 9078, 2006 WL 618786, at *2 (S.D.N.Y. Mar. 9, 2006) (holding that party waived work product protection where no privilege log asserted it); Bowne of NYC, 150 F.R.D. at 489-90 (holding that party waived work product protection where privilege log only asserted attorney-client privilege over the document). Accordingly, because the Notes are not privileged nor immune from disclosure, the Court should order that they be produced.

III. PLAINTIFF WAIVED ANY PRIVILEGE OR IMMUNITY FOR THE NOTES BY USING THEM TO PREPARE FOR HIS DEPOSITION.

Even if Mr. Graves could establish that the Notes were subject to the attorney-client privilege or immune from disclosure under Fed. R. Civ. P. 26(b)(3)(A), the Court should still order the production of the Notes because Mr. Graves used them in preparation for his deposition and the Notes likely had an impact on his testimony. Accordingly, pursuant to Fed. R. Evid. 612(2), DBSI is entitled to use the document to cross-examine Mr. Graves.[6]

In a recent case in this District decided on similar facts, the court held that the plaintiff waived any privilege by reviewing her own handwritten notes of a conversation in aid of testifying at her deposition. See Thomas v. Euro RSCG Life, 264 F.R.D. 120, 122 (S.D.N.Y. 2010) ("Since these conversations were a central part of the deposition, it is clear that the notes likely had an impact on plaintiff's testimony."); see also Bank Hapoalim, B.M. v. Am. Home Assurance Co., No. 94 Civ. 3561, 1994 WL 119575, at *6-7 (S.D.N.Y. Apr. 6, 1994) (holding that, pursuant to Fed. R. Evid. 612, courts first look to determine whether the privileged document had an "impact" on the testimony, then analyze whether disclosure is "in the interests of justice"). Of particular note in Thomas, Judge Rakoff ruled that Fed. R. Evid. 612(2) required the production of the handwritten notes "in the interests of justice," because the notes were merely a recitation of a conversation, and because the conversation was critical to the case:

> The notes are simply a factual recitation, arranged chronologically, and evince no work-product concerns. They relate to conversations about which the witness knew she would be questioned . . . Finally, since the subject matter of these conversations, and the conversations themselves, are likely to play a substantial role in

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[6] Fed. R. Evid. 612 provides, in pertinent part:

> [I]f a witness uses a writing to refresh memory for the purpose of testifying . . . before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

> plaintiff's case, it is in the interests of justice for defendants to be able to adequately cross-examine plaintiff by having access to notes that plaintiff admitted to reviewing so that she could answer questions "accurately."

Thomas, 264 F.R.D. at 122; see also E.E.O.C. v. Johnson & Higgins, Inc., No. 93 Civ. 5481, 1998 WL 778369, at *11-12 (S.D.N.Y. Nov. 6, 1998) (ordering, pursuant to Fed. R. Evid. 612(2), production of privileged communication that plaintiff used to refresh his recollection prior to deposition); Redvanly v. Nynex Corp., 152 F.R.D. 460, 469-472 (S.D.N.Y. 1993) (ordering, pursuant to Fed. R. Evid. 612(2), production of notes of meeting, arguably constituting attorney work product, that had been used to refresh witnesses' recollection prior to deposition).

In this case, as in Thomas, the Notes are factual in nature and concern a conversation that is heavily relied upon by Mr. Graves to argue for a finding of age discrimination. Moreover, there can be no doubt that the Notes impacted Mr. Graves's testimony. He admitted that he reviewed the Notes in preparation for his deposition, (see Seltzer Aff. Exh. F at 224:11-225:4), and his testimony regarding the January 14 conversation parrots the language of the Notes almost precisely – save for the addition of the age-related comment, which is not reflected in the Notes of that conversation. (Compare Seltzer Aff. Exh. F at 246:12-21 with Seltzer Aff. Exh. A at Graves065018.) A finding that the Notes impacted Mr. Graves's testimony is also buttressed by the fact that the conversation in question occurred seven years ago, making it that much more likely that he has relied on the Notes to refresh his recollection, especially where he testified that he created the Notes so that he could use them to prepare himself even a short time later when meeting with attorneys back in 2004. In short, the Notes are explosive evidence for the defense, and, as in Thomas, "it is in the interests of justice for defendants to be able to adequately cross-examine plaintiff by having access to the notes that plaintiff admitted to reviewing."

Accordingly, even if the Court were to find that the notes were privileged, either under the attorney-client privilege or pursuant to Fed. R. Civ. P. 26(b)(3)(A), discovery of the Notes would still be required "in the interests of justice" pursuant to Fed. R. Evid. 612(2).

IV. EVEN IF PLAINTIFF HAD NOT WAIVED THE LIMITED IMMUNITY OF RULE 26(b)(3)(A), THE NOTES DO NOT CONTAIN THE MENTAL IMPRESSIONS OF AN ATTORNEY AND DBSI CAN SHOW THE REQUISITE NEED TO OVERCOME THE LIMITED IMMUNITY UNDER RULE 26(b)(3)(A).

Although the foregoing analysis thoroughly disposes of any argument Plaintiff might make to resist discovery of the Notes, even if Mr. Graves had not waived the protections of Rule 26(b)(3)(A), DBSI is still entitled to production of the Notes. The immunity afforded by Rule 26(b)(3)(A) is not absolute; under the Rule, a showing by a party "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means" will overcome the immunity. Fed. R. Civ. P. 26(b)(3)(A)(ii).

In this case, DBSI can easily demonstrate its substantial need for the Notes and its inability to obtain their substantial equivalent: there exists no other written record of the oral communications at issue, which occurred seven years ago. Witnesses' memories can be unreliable, or, in Mr. Graves's case, potentially fabricated – as evidenced by the Notes. These circumstances clearly justify production of the Notes over any work product objections. See, e.g., Redvanly, 152 F.R.D. at 468-469 (collecting cases where work product immunity was overcome in circumstances where witness memories faded over time, witness accounts varied, credibility was at stake with regard to a key issue, or the writing was the only contemporaneous record of an oral communication). Moreover, because the Notes do not contain an attorney's mental impressions, there is no need to afford them any special protection. See id.

Accordingly, even if Mr. Graves had asserted immunity under Rule 26(b)(3)(A) as a basis to withhold the Notes, DBSI can overcome that limited immunity and the Notes should be produced.

CONCLUSION

For the foregoing reasons, DBSI respectfully requests that the Court grant its Motion to Compel, together with such other and further relief as the Court may deem just and proper.

Dated: New York, New York
January 27, 2011

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CERTIFICATE OF SERVICE

I, Carol Ann Sterling, an attorney admitted to practice in the State of New York, and not a party to this action, state under penalty of perjury that on January 27, 2011, a true and correct copy of the foregoing Memorandum of Law in Support of Defendant's Motion to Compel Production of Documents Clawed Back by Plaintiff Pursuant to Rule 26(b)(5)(B) was served through the Court's ECF system and by Federal Express overnight delivery upon the following:

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